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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN ORLANDO MITCHELL, Defendant and Appellant.	E052488 (Super.Ct.No. FWV1001214) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Sachs, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr., and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant John Orlando Mitchell was convicted of one count of possession for sale of a controlled substance in violation of Health and Safety Code section 11351, and one count of transportation of a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). Defendant was sentenced to state prison for a total term of 15 years. He appeals, challenging the trial court's rulings regarding the admission of certain evidence and the jury instructions. Finding no errors, we affirm.

I. FACTS

A. The Prosecution's Case

On May 13, 2010, Deputy Sheriff Michael Rose stopped a black Monte Carlo in Rancho Cucamonga for driving with tinted windows. Defendant was sitting in the front passenger seat. Upon learning that defendant was on parole, Deputy Rose conducted a mandatory parole search. The deputy searched defendant and the vehicle. During the search, Deputy Rose found a prescription bottle of hydrocodone underneath the passenger seat that was issued to someone named Jesse Taylor. Defendant claimed he had picked up the bottle for a friend. When Deputy Rose asked for Taylor's address and telephone number, defendant said that he could not offer any information.

Defendant told Deputy Rose there was another bottle inside the vehicle that belonged to him. Deputy Rose located the second bottle in the center console, along with two loose tablets. The second bottle label was partially torn off and showed the prescription number but not the name of the person to whom the medication was

prescribed. Deputy Rose arrested defendant and transported him to the police station. During a search of defendant, the deputy found $558. During the booking process, Deputy Rose asked whether defendant was employed in order to determine whether he had obtained the money in his pocket by selling drugs. Defendant said he was unemployed.

Deputy Rose called the pharmacy that had filled Jesse Taylor's prescription and obtained the telephone number on file. The deputy called the number several times but no one answered. Eventually, the telephone number was shut off or disconnected. The pharmacy also provided a name and telephone number for the second prescription bottle found in the car. The owner was identified as Dion or Diane White; however, when Deputy Rose called the number, the woman who answered claimed ignorance of anyone named "White" and then hung up when Deputy Rose identified himself.

While the prescriptions were dispensed at two different pharmacies, they were both written by Dr. Antonio Llamas Jimenez. Further investigation revealed that defendant picked up the "White" prescription on May 11, 2010, along with a bottle of hydrocodone prescribed to him by Dr. Jimenez, and then picked up the "Taylor" prescription on May 13, 2010, at 3:35 p.m. Criminalist Darci Fullner analyzed the drugs found and identified several different types of pills, all of which were various concentrations of acetaminophen and hydrocodone.

B. The Defense

Jesse Taylor, a longtime friend of defendant, testified that on May 13, 2010, he asked defendant to pick up his prescription medications, which included hydrocodone, because he did not drive. He testified that he needed the hydrocodone due to having five pins in his hip. On cross-examination, Taylor admitted he had been convicted of grand theft of a vehicle in 1994, second degree burglary in 1995, receiving stolen property in 1997, and forgery in 2004. Taylor stated he had never asked defendant to pick up his drugs before, and that he never received any of his prescriptions. Taylor acknowledged that if defendant were in trouble, he would try to help him if he could.

C. Rebuttal

According to Deputy Sherry Eversole, defendant picked up Taylor's prescription for hydrocodone on May 13, 2010, and the rest of Taylor's prescription on May 5, 2010.

II. ADMISSION OF DEFENDANT'S STATEMENT REGARDING EMPLOYMENT

Defendant contends the trial court erred when it admitted his statement to Deputy Rose that he was unemployed, because the statement was made after he had asserted his *Miranda*[1] rights and for the specific purpose of eliciting an incriminating response. The People respond that the statement was made in response to standard questioning necessary to complete the booking process.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

A. Further Background Facts

Prior to trial, defendant moved in limine to suppress statements he made to Deputy Rose during the booking process, including the statement that he was unemployed. At the hearing on the motion, Deputy Rose testified that he had found prescription pills (not in defendant's name) in the car in which defendant was a passenger, and then found $558 in cash on defendant's person. Defendant was arrested and read his *Miranda* rights, which he invoked. Later, during the booking process, Deputy Rose asked defendant questions from the standardized booking form, which contains a question as to whether the subject is employed. According to Deputy Rose, there is no other booking form that omits this employment question, and he asks this question in every booking. Deputy Rose testified that he went through the entire booking application with defendant. The deputy further explained that when collecting money during booking, it would be booked as evidence or property to be kept at the jail. Deputy Rose concluded that the money found on defendant came from drug sales and, thus, was evidence.

On cross-examination, Deputy Rose acknowledged that a subject's employment is not a factor for jail safety concerns. He also testified that after defendant stated he was unemployed, he (Deputy Rose) asked defendant several questions about the source of the money found on him. Defendant explained the money was his friend's unemployment check, which would be used for rent.

Defense counsel argued that defendant's statement regarding the state of his employment was inadmissible because the purpose of the question was purely

investigatory and reasonably likely to elicit an incriminating response, i.e., it was asked to determine whether the $558 was from drug sales.

In response, the prosecutor pointed out that answers to many of the standard booking procedure questions could theoretically be used against a defendant; however, he argued these questions are asked during each and every booking procedure for booking purposes and are not designed to elicit incriminating responses. Regarding the follow-up questions, the prosecutor argued that they were asked to determine whether the money found on defendant should be booked as evidence or as his property. Nonetheless, the prosecutor stated he would not seek to admit defendant's answers to those questions as evidence at trial.

The trial court held that defendant's statement that he was unemployed would be admitted into evidence; however, his answers regarding the source of the money would not. The court said: "The long and short of it is . . . I believe that he's being asked questions that are routine to the booking process. So as far as the unemployment question being asked or the employment question, I would allow that not being in violation of *Miranda*. Any other questions, though, after he has been advised of his rights and he has chose[n] to assert those rights appropriately, then the dollars are what the dollars are, whether they are being inventoried, or whether they're evidence, it's a factual basis as to the amount of money."

B. Analysis

"When a defendant challenges the admissibility of [his] postarrest statements on the ground they were elicited in violation of *Miranda*, the People have the burden of proving by a preponderance of the evidence that the statements were not the product of a *Miranda* violation. [Citations.] In reviewing a trial court's ruling on a motion to suppress based upon a violation of *Miranda*, '"we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained." [Citation.]' [Citation.] Here, the facts concerning the booking interview are not in dispute. Accordingly, we review the admissibility of the defendant's statements de novo." (*People v. Gomez* (2011) 192 Cal.App.4th 609, 627 [Fourth Dist., Div. Two] (*Gomez*).)

California and federal courts have long applied the booking question exception to *Miranda*. (See, e.g., *People v. Rucker* (1980) 26 Cal.3d 368, 387, superseded by statute as stated in *Gomez, supra*, 192 Cal.App.4th at p. 630, fn. 11; *U.S. v. Booth* (9th Cir. 1981) 669 F.2d 1231, 1238; *U.S. ex rel. Hines v. LaVallee* (2d Cir. 1975) 521 F.2d 1109, 1112-1113.) "The fact that the information gathered from routine booking questions turns out to be incriminating does not, by itself, affect the applicability of the exception. [Citations.] In *U.S. ex rel. Hines v. LaVallee*[, *supra*,] 521 F.2d 1109, for example, an assailant told his robbery and rape victim during the commission of the crimes that he

had been married 11 years and had two children. [Citation.] After the defendant was arrested and before being *Miranda*ized, he was asked 'background data (i.e., his name, address, age, marital status) . . . .' [Citation.] He told the officer that he had been married for 11 years and had two children. [Citation.] Although the response was incriminating, the Second Circuit held that it was admissible because it 'constituted merely basic identification required for booking purposes . . . .' [Citation.]" (*Gomez, supra*, at pp. 629-630.) Thus, if the question to defendant regarding his employment is a legitimate booking question and not designed to elicit an incriminating admission, his response is admissible despite its incriminating effect and the absence of *Miranda* warnings.

"In determining whether a question is within the booking question exception, courts should carefully scrutinize the facts surrounding the encounter to determine whether the questions are legitimate booking questions or a pretext for eliciting incriminating information. [Citation.] Courts have considered several factors, including the nature of the questions, such as whether they seek merely identifying data necessary for booking [citations]; the context of the interrogation, such as whether the questions were asked during a noninvestigative clerical booking process and pursuant to a standard booking form or questionnaire [citations]; the knowledge and intent of the government agent asking the questions [citations]; the relationship between the question asked and the crime the defendant was suspected of committing [citations]; the administrative need for the information sought [citations]; and any other indications that the questions were

designed, at least in part, to elicit incriminating evidence and merely asked under the guise or pretext of seeking routine biographical information [citations]." (*Gomez, supra,* 192 Cal.App.4th at pp. 630-631.)

Applying the above factors, defendant contends that "[t]he *only* factor that weighs in favor of finding that [Deputy] Rose's question was a routine booking question . . . is that the San Bernardino Sheriff's Department has a pre-printed data field for recording the name of an individual's employer on its booking form." Otherwise, defendant argues that his employment status "is not the type of data that can be used to identify or otherwise distinguish between individuals who are booked into jail," "[t]he decision whether to categorize physical property as evidence that a suspect committed a crime is an investigative one, not an administrative one," Deputy Rose knew that defendant's answer regarding his employment status "could be incriminating and that he specifically asked it in order to elicit an incriminating response," and the employment question was directly related to the charges against defendant and designed to elicit incriminating evidence. In response, the People argue that "all of these 'factors' only set forth another way of asking the only pertinent question—was the question at issue *designed* to elicit an incriminating response."

While the question may not have been designed to elicit an incriminating response, defendant faults the People for overlooking Deputy Rose's testimony. Defendant highlights the following excerpts of Deputy Rose's testimony: The significance of the question is "to determine if somebody has money in their [*sic*]

possession from working or from doing something illegal." "If somebody's arrested for sales and they have a large quantity of small denomination[s] of currency such as ones, fives, tens, quantities of money which narcotics are usually sold for that dollar amount, then I would ask." The employment question is used as an investigative tool. Given Deputy Rose's testimony, defendant argues that such "testimony can and should be understood to mean that the reason the Sheriff's Department regularly asks illegal sales suspects during the booking process whether they are employed is to determine whether the money they are carrying may be evidence of a crime, i.e., the question about employment has been placed on the form and is therefore *designed*, at least with respect to sales cases, to elicit incriminating information from suspects when they are booked."

Clearly, the issue of whether the employment question used under the facts of this case is a close one; however, considering the facts surrounding the encounter, we cannot say the trial court erred in its ruling. In addition to asking defendant's employment status, Deputy Rose asked several questions about the source of the money found on defendant's person. By itself, a booking question regarding employment is innocuous. It serves the purpose of providing the arresting agency with information as to whether a defendant has been properly identified, where to locate him/her if released on bail, or whether he/she may need the services of the public defender's office. Thus, there is a legitimate administrative function for this question. While defendant argues that in cases involving drug sales, the question is asked "to determine whether the money that they are carrying is derived from illegal drug sales, i.e., whether it implicates them in a

crime[,]"the same can be said with cases involving theft crimes. Thus, defendant would have this court eliminate the employment question in all drug sales or theft-related crimes. Such is not reasonable. However, when, during the booking process, a defendant is questioned beyond his/her employment, as was done in this case, we agree with defendant (and the trial court) and conclude that questions regarding the source of any money located on the defendant is designed to elicit an incriminating response.

Notwithstanding the above, even if defendant's statement that he was unemployed were inadmissible, the error in permitting Deputy Rose's testimony was harmless. We evaluate error in the admission of a defendant's statements under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Johnson* (1993) 6 Cal.4th 1, 32-33.) Under that standard, an error may be found harmless only when the reviewing court concludes beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, at p. 24.) Error in admitting a statement obtained in violation of *Miranda* is generally deemed harmless if there was other, properly admitted evidence that established the fact sought to be proven by means of the statement. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 60.)

Here, the prosecution's theory was that defendant possessed prescription drugs for sale. Defendant claimed he only possessed the drugs for his own personal use. The status of his employment was irrelevant given the other evidence presented. Defendant was found in possession of two prescription bottles, not in his name, containing over 140

hydrocodone pills in different colors. Defendant was unable to provide the contact information for the person(s) for whom he was picking up the prescriptions. Deputies Rose and Eversole testified that, in addition to the large amount of money on defendant's person, the amount of prescription drugs possessed, and the way in which they were possessed, i.e., different colored pills mixed together in the same bottle without identifying information, indicate possession for sale rather than personal use. Additionally, the jury heard the testimony of two other officers who previously had arrested defendant upon being found with large amounts of cocaine, marijuana, and cash. In the officers' opinions, defendant possessed those drugs for sale. Based on the record before this court, the verdict was not attributable to any error in admitting evidence of the booking questions regarding employment.

Nonetheless, defendant points to the fact that after deliberating for a few hours, the jury requested a readback of Deputy Rose's testimony regarding the booking. Given this request, defendant argues that the "jury's focus on this fact alone as something it needed to rehear in order to come to a decision makes it impossible to make a principled finding *beyond a reasonable doubt*." We disagree. There is no indication in the record before this court, nor does defendant contend, that the jury requested a readback of the booking testimony for the sole reason of confirming that defendant was unemployed. In any event, in comparison to the evidence presented, defendant's negative answer to the question of whether he was employed was of minor importance. In today's economy, many people are unemployed, especially in San Bernardino County. The fact that

defendant was one of them did not supply any missing link in the evidence, and any error in admitting Deputy Rose's testimony was harmless.

III. EXCLUSION OF EVIDENCE REGARDING THE SOURCE OF THE MONEY FOUND ON DEFENDANT'S PERSON

Defendant faults the trial court for admitting his statement that he was unemployed while excluding his answers to Deputy Rose's questions regarding where he obtained the $558 found in his pocket. (Evid. Code, § 356.)[2]

A. Further Background Facts

After the trial court's in limine ruling, Deputy Rose testified as to defendant's statement that he was unemployed. On cross-examination, defense counsel asked Rose: "Did [defendant] make any other statements to you other than after he told you he was unemployed about where the money came from?" The prosecutor objected on hearsay grounds. Defense counsel asserted that the answer "is part and parcel of the completeness of the unemployed statement. They were asked immediately afterwards." Following a discussion off the record, the trial court sustained the prosecutor's hearsay objection.

Outside the presence of the jury, defense counsel argued that defendant's statements regarding where and how he obtained the money found in his pocket should be admitted because these statements were related to defendant's statement that he was

[2] All further statutory references are to the Evidence Code unless otherwise indicated.

unemployed insofar as it "relates to the same matter which is the $558" and occurred close in time to the admitted statement of being unemployed. The prosecutor maintained his hearsay objection, arguing that the question to defendant about whether he was unemployed was "a completely different track of conversation," and did not have anything to do with the money. Neither side was able to locate defendant's friend, Chennel Coleman, whose alleged unemployment check was cashed.

The trial court sustained the prosecutor's objection on the ground that the follow-up questions did not explain why defendant was unemployed. "[T]he purpose of [section] 356 [is to] [a]llow[] further inquiry into [an] otherwise inadmissible matter only where it relates to the same subject and it is to make the already introduced conversation understood. [¶] The evidence that was introduce[d] is that he was unemployed, and the fact that he has money in his possession doesn't explain why he's unemployed or not or clarifies the issue of employment. It relates to perhaps a different issue unrelated to unemployment. So, I would sustain the objection to those questions that [defense counsel] would like to ask regarding the money at this point in time."

Citing *People v. Arias* (1996) 13 Cal.4th 92, the court further explained that "[w]hen a statement admitted into evidence is part of the conversation, the opponent is entitled to have everything apparent said during that conversation placed into evidence provided the other statements are relevant to the statement already admitted; and again it's the unemployed—whether he's employed or not, it seems to me to be the issue of the statement, so again that's just another case."

Both parties used the fact that there was no evidence explaining where defendant obtained the money in his pocket. The prosecutor used defendant's unemployment to argue that defendant had no explanation for the source of the $558 found on him. Defense counsel responded: "[Deputy Rose] asked if [defendant was] employed. And when [he] says, no, he has no further questions. According to the evidence that you have if you're an investigating officer, you're not going to follow up on that? There's no evidence in this trial that he asked any further questions about where did that money come from."

B. Analysis

Section 356, in part, provides that: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached . . . conversation . . . is given in evidence, any other . . . conversation . . . which is necessary to make it understood may also be given in evidence." (See *People v. Arias, supra,* 13 Cal.4th at p. 156 & fn. 24.) "A trial court's determination of whether evidence is admissible under section 356 is reviewed for abuse of discretion." (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.)

According to defendant, his statement relating to the fact that he was unemployed was a "detached" portion of his interview during the booking process with Deputy Rose, entitling him to introduce his statements as to how he came into possession of the $558. He argues "the trial court erred [in determining] the subject matter of the question, 'Are

you employed?' in theoretical isolation [when it should have considered] why [his] answer was relevant and admissible under the facts of this particular case." We disagree. To begin with, defendant fails to take into account the remaining portion of section 356, which allows introduction of additional parts of a conversation only if they are needed to explain the statement in evidence. Here, defendant's statements regarding how he obtained the $558 did not explain the fact that he was unemployed nor were they necessary to the understanding of his statement that he was unemployed. (*People v. Page* (2008) 44 Cal.4th 1, 37 [rejecting the defendant's claim of third party culpability, stating: "The flaw in defendant's theory is that the proffered evidence has no tendency to establish any relevant fact."].) More important, and as the People aptly note, "the admission of these statements would have allowed [defendant] under the guise of seeking to present a 'complete picture' . . . to enter into evidence self-serving hearsay statements not otherwise admissible while avoiding cross-examination on the issue." Defendant's remedy was to either take the stand himself or bring in defendant's friend, Chennel Coleman, to tell the jury how he obtained the $558. Given the above, the trial court did not abuse its discretion in excluding the statements.

IV. OTHER CRIMES EVIDENCE

Defendant contends the trial court erred in allowing the prosecution to call two peace officers who testified that they found defendant in possession of cocaine and marijuana in 2005 and 2007, and that, in their opinion, he possessed the drugs for sale. He claims the evidence was erroneously admitted, in violation of section 1101,

subdivision (b), section 352, and his due process right to a fair trial. We conclude the evidence was properly admitted to show that defendant intended to sell the prescription drugs found in his possession.

A. Further Background Facts

The prosecutor moved in limine to introduce evidence of four prior incidents where defendant was allegedly found to be in possession of cocaine or marijuana for sale, in order to show his intent. The prosecutor argued that the only dispute in the present case was why defendant had the prescription drugs, and these prior incidents were probative in showing the jury that he harbored the same intent for the prior crimes that he harbored for the current crimes, i.e., the intent to sell. Defendant opposed the motion. The trial court denied the prosecution's motion with respect to the two incidents that were purported to have occurred in 1992 and 2000; however, it allowed the 2005 and 2007 incidents.

Officer Reuben Cordoba testified regarding the 2005 incident. During a search of defendant's residence, Officer Cordoba found marijuana and a half gram of crack cocaine separated into three "rocks." Also, he found $741 in cash in various denominations and no indicia that the drugs were possessed for personal use. Defendant was charged with possession of cocaine for sale. He pled guilty to simple possession of a controlled substance and the possession for sale charge was dismissed; the money found was returned to Audrey Wince. Officer Cordoba opined that defendant possessed the drugs for sale.

Detective Mary Yanez testified regarding the 2007 incident. During a search of defendant's person, the detective found 12 individually packaged bundles of marijuana in defendant's right front pants pocket packaged as "nickel bags," $52 in his left front pants pocket, and $501 in his shoe. There was nothing to indicate the drugs were possessed for personal use. Defendant was charged with and pled guilty to possession of marijuana for sale. Detective Yanez opined that defendant possessed the drugs for sale.

The jury was instructed with CALCRIM No. 375 (other crimes evidence). During closing, the prosecutor argued that the evidence of defendant's intent to possess drugs for sale in 2005 and 2007 demonstrated that he had the same intent for his current crimes. Defense counsel reminded the jury that it could consider defendant's prior crimes "only for the issue of intent."

B. Section 1101, subdivision (b)

Section 1101, subdivision (b), provides that evidence of a person's prior criminal act is admissible "'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .) other than his or her disposition to commit such an act.' . . . Moreover, to be admissible, such evidence '"'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'"' [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 586-587.) "'On appeal, we review a trial court's ruling under Evidence Code section 1101 for abuse of discretion. [Citation.]' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 202.)

Here, defendant has not met his burden of establishing that the trial court abused its discretion when it allowed his 2005 and 2007 offenses to be introduced to prove the main issue of fact at trial, namely, his intent when he possessed a large quantity of prescription drugs which were not prescribed to him. Defendant contends his prior offenses were not sufficiently similar to the charged offense to support the inference that he harbored the same intent in each instance. Specifically, he argues that the officers' opinions that he "harbored an intent to sell *illegal* drugs—do not have any tendency in reason to demonstrate that [he] must have harbored the same intent when he was found, under entirely different circumstances, to be in possession of *prescription* drugs . . . while he was travelling in a car away from home with no cell phone or other known means of communication." In response, the People contend the facts of the prior offenses are sufficiently similar to the facts of the current offense. The similarities include possession of a large amount of cash in various denominations, along with possession of a large quantity of drugs that appeared to be packaged for sale. The People argue that "[w]hile the circumstances of the prior offenses and the current offense are not identical, when a prior offense is admitted for its relevance to prove intent, 'a distinctive similarity between the two crimes is often unnecessary for the other crime to be relevant.' (*People v. Wilson* (1991) 227 Cal.App.3d 1210, 1217, internal quotations omitted.)" We agree with the People.

In prosecutions for drug offenses, evidence of prior drug use and prior drug convictions is generally admissible under section 1101, subdivision (b), to establish that

the drugs were possessed for sale rather than for personal use and to prove knowledge of the narcotic nature of the drugs. (*People v. Pijal* (1973) 33 Cal.App.3d 682, 691 [in prosecution for selling methamphetamine, evidence of prior drug offenses was admissible to show knowledge of the nature of the drug and intent to sell].) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) Thus, the fact that the current offense involved prescription drugs while the prior offenses involved illegal drugs goes to the weight of the evidence, not its admissibility.

C. Section 352

Under section 352, the trial court has the discretion to admit evidence that is relevant to prove a material fact as long as its probative value is not outweighed by its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 213.) Although "[e]vidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis'" (*Ewoldt, supra*, 7 Cal.4th at p. 404), a trial court's decision to admit evidence under section 352 will not be overturned absent a clear abuse of discretion (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396). Although defendant argues that "[n]ot a single relevant factor weighs in favor of admitting evidence of two prior possession incidents,"[3] based on the record in

[3] Defendant argues that the inference created by the evidence was weak, the jury was not told that defendant was punished for the prior conduct, the 2005 uncharged offense was significantly more inflammatory than the charged offense, and the uncharged offenses occurred three and five years before trial.

this case, we cannot say the trial court abused its discretion in admitting relevant evidence tending to prove a material fact.

The prior crimes evidence had substantial probative value and was more probative than prejudicial. (§ 352; *Ewoldt, supra*, 7 Cal.4th at pp. 404-405 [prior crimes evidence must have substantial probative value and not be more prejudicial than probative]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1214 [prejudice referred to in § 352 "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*"].) The strikingly similar circumstances surrounding defendant's prior and current arrests strongly indicate he possessed the prescription drugs for sale. And, although the prior crimes were to some extent prejudicial, they were no more prejudicial than the evidence concerning his current arrest. (*Ewoldt, supra*, at p. 405 [potential prejudice is lessened when prior crimes evidence is "no more inflammatory" than evidence concerning charged offenses].)

Nonetheless, defendant further argues that the prosecutor used the other crimes evidence "during closing as pure propensity evidence, which is explicitly barred by . . . section 1101 and inherently prejudicial under . . . section 352." This is a non sequitur. If, as defendant claims, the prosecutor "misused" the prior crimes evidence to argue that defendant had a propensity to commit the charged crime, it does not follow that the evidence was inadmissible to show intent. Furthermore, the trial court instructed the jury not to consider the prior crimes evidence to infer that defendant had a propensity to commit the charged crime.

V. DENIAL OF DEFENDANT'S ATTEMPT TO DISCREDIT EXPERT TESTIMONY

Defendant faults the trial court for refusing to allow him to "discredit" the testimony of Officer Cordoba with defendant's plea agreement.

In the opinion of Officer Cordoba, defendant possessed cocaine for sale. Defendant sought to admit the results of the plea agreement, which showed that he pled guilty only to possession of cocaine for personal use, in order to see if that changed the officer's opinion. The prosecutor objected on relevancy grounds and argued that the issue is what the officer thought at the time of the incident. The prosecutor noted that the ultimate disposition of that case, which could include a plea of guilty to a lesser offense for any number of reasons, had no bearing on what the officer thought at the time of arresting defendant. Officer Cordoba testified outside the presence of the jury pursuant to section 402 that he was not aware that defendant pled guilty to simple possession, and that he had no knowledge as to why such a plea agreement was reached. The trial court sustained the objection on the grounds that the officer did not testify that he had relied upon the plea agreement in rendering his opinion, and it did not constitute evidence that could be presented to the jury when compared to a canceled check which could show that the allegedly drug sales money was in fact returned to its rightful owner.

On appeal, defendant contends the trial court erred because (1) the reasons why he entered into a plea agreement go to weight, not admissibility, (2) he was entitled to impeach the officer's testimony as being biased or unreliable based on all the facts, (3) he

should have been able to use the plea agreement to cross-examine the officer and show that the money was returned to a third party, and (4) he should have been able to introduce the plea agreement pursuant to *People v. Griffin* (1967) 66 Cal.2d 459, 465-466 (*Griffin*) (if prosecution introduces evidence the defendant committed an uncharged offense, the defendant must be allowed to introduce evidence that shows he was tried and acquitted of the charges) and *People v. Jenkins* (1970) 3 Cal.App.3d 529, 533-535 (*Griffin* rule extended to hold that evidence that the defendant was not prosecuted for the prior offense also tends to weaken and rebut the prosecution's evidence that the defendant committed the other offense). We disagree.

The fact that defendant pled to simple possession of cocaine in 2005 had no bearing on Officer Cordoba's credibility or opinion that defendant possessed the cocaine for sale. There can be many reasons why defendant pled to simple possession, including problems of proof which have no bearing on the truthfulness or accuracy of the testimony describing the incident. Evidence of the plea agreement was irrelevant to the facts surrounding defendant's arrest by the officer. Defendant's reliance on *Griffin* and *Jenkins* is misplaced. Neither case deals with the situation where the defendant entered into a plea agreement. As the People aptly note, "[u]nlike an acquittal where a jury had a reasonable doubt that the prior crime occurred and unlike a prosecutorial decision to not file charges, plea bargains are reached in cases for a variety of reasons, many of which have nothing to do with the strength of the evidence. . . . That [defendant] pleaded guilty to a lesser included offense, unlike an acquittal or decision not to prosecute, has no

tendency in reason to cast doubt on whether [he] actually committed the greater offense." Consequently, while it is conceivable that under some circumstances the reasons why a plea agreement was entered into may be relevant to rebut the prosecution's evidence concerning a prior offense or to impeach the testimony of the alleged victim of the prior offense, the bare fact that a plea agreement was entered into is not relevant to rebut the prior crimes evidence or to impeach the officer's veracity. Here, the defense made no offer of proof as to the reasons a plea agreement was entered into. The proponent of the evidence has the burden of demonstrating its relevance, and the failure to do so precludes appellate review of any contention that the evidence was erroneously excluded. (§ 354.) Accordingly, the trial court did not abuse its discretion in determining that the plea agreement was not admissible. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

VI. CUMULATIVE ERROR

We do not address defendant's contention that there was cumulative prejudicial error below, because we have found no prejudicial error. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.)

VII. CALCRIM NO. 2300

In his final contention, defendant argues the trial court erred in instructing the jury on the elements of transportation of a controlled substance. He claims that CALCRIM No. 2300, the standard jury instruction relating to that offense, failed to inform the jury that "an individual is privileged to transport controlled substances 'upon the written

prescription of a physician,'" and that "an authorized patient or pharmacy representative is permitted to effectuate the delivery of prescription drugs to a patient."

Preliminarily, the People argue the instructional challenge has been waived because, at the trial level, defendant failed to object to the instruction on the ground that it did not include the language which he now claims should have been included. Although an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant were affected thereby (Pen. Code, § 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503-506), failure to object forfeits the issue unless the error affects the defendant's substantial rights (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927).

We therefore review the challenged instruction to determine if defendant's rights were affected by the instructions, that is, "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) Not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. (*People v. Huggins* (2006) 38 Cal.4th 175, 192.) In this case, we find no error.

A. Further Background Facts

Health and Safety Code section 11352, in relevant part, provides: "[E]very person who transports . . . any controlled substance . . . unless upon the written prescription of a physician . . . shall be punished by imprisonment . . . ." At trial, the jury was instructed pursuant to CALCRIM No. 2300, as follows: "The defendant is charged in Count Two

with transporting Opiates, a controlled substance. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant transported a controlled substance; [¶] 2. The defendant knew of its presence; [¶] 3. The defendant knew of the substance's nature or character as a controlled substance; [¶] 4. The controlled substance was Opiates; [¶] AND [¶] 5. The controlled substance was in a usable amount. [¶] A person *transports* something if he or she carries or moves it from one location to another, even if the distance is short. [¶] A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user. [¶] The People do not need to prove that the defendant knew which specific controlled substance he transported, only that he was aware of the substance's presence and that it was a controlled substance. [¶] A person does not have to actually hold or touch something to transport it. It is enough if the person has control over it, either personally or through another person." The jury found him guilty of possession for sale, and transportation, of a controlled substance.

B. Analysis

According to defendant, "[t]he fact that a person does not engage in illegal transportation of prescription drugs if he or she is authorized to deliver a prescription to an ultimate user is a critical element in a transportation case involving prescription drugs and was a key part of [defendant's] defense." Thus, he argues the trial court "had a *sua sponte* duty to provide adequate instruction on the point, and its failure to do so resulted

in a violation of [his] substantial constitutional rights." In response, the People argue that even if we assume the instruction was deficient such that the trial court erred in its instruction to the jury, such error was harmless. The People contend that because the jury found defendant guilty of possession for sale of opiates, it necessarily found that defendant had the intent to sell the prescription drugs in his possession. Given this result, defendant concedes that the instructional error is rendered harmless. We agree. Because we have not found just cause to reverse the sales count, we necessarily conclude that any error in instructing the jury with CALCRIM No. 2300 was harmless.

VIII. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.